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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HUSSMANN CORPORATION,
Petitioner,

VS.

ROSETTA COOK,
Respondent.

RESPONDENT'S REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Facts

Respondent respectfully suggests that the Petitioner's Statement of the Case incorrectly states the operative facts by partially quoting from the affidavits of Rosetta Cook and Ray A. Gerritzen, her attorney, and failing to include other facts. Respondent believes it is necessary to point these out.

Hussmann had receipt of Cook's Missouri Workers' Compensation claim against Hussmann, which specifically indicates that she was represented by Ray A. Gerritzen, Attorney at Law (L.F. 18, 22, 35-36). Thereafter, Eldon Williams of Hussmann's Industrial Relations Department called Cook into his office, and Cook states the following occurred:

"Williams said to me, 'I want to talk to you about the injury that you have filed a claim against this company.' I then informed Eldon Williams that I had been instructed by my attorney, Ray A. Gerritzen, that no company representative had any right to privately talk to me about the case. I specifically informed Eldon Williams, 'It is very unethical for you to want to discuss this case with me, knowing I have a lawyer.' I had also stated, 'I am not discussing anything unless I have a shop steward present.' When these 2 statements were made by me to Eldon Williams he became extremely hostile, argumentative, pointed his finger in my face, and shouted in a loud voice at me, 'I have a right to discuss this injury claim with you and you sit down —you sit down!' as I was attempting to raise up out of my chair at the time. I repeated, 'I am not talking to you without a shop steward,' whereupon Williams stated, 'I demand for you to sit down and I am giving you a direct order to sit down in that chair!' He was extremely belligerent, continued to point his finger in my face, and repeated, 'You get back in that chair and sit down. I am giving you a direct order. Sit down!' He repeated that he had a right to talk to me as 'you're making a claim against this company', and 'I have a right to talk to you about this claim.' I then told Williams, 'I am not talking to you. I was brought up to respect my elders. You are old enough to be my father, and you're talking to me like a dog, and I am not talking to you without a shop steward' and I walked out of the office of Eldon Williams." (L.F. 11-12)[1]

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[1] Petitioner states at page 4 of its Statement of the Case that "He (Eldon Williams) called Cook to his office to inquire about the apparently false statements in her original employment application (id). Cook refused to answer Williams' questions. She stated it was 'unethical' for him to inquire of her because she had a lawyer and that she would not discuss anything without a union representative present, and walked out of his office (per

(Footnote 1 continued on next page)

Thereafter, Cook was called to Eldon Williams' office later that afternoon, and she states the following occurred:

> "At 12:45 p.m. I arrived for the second time at the office of Eldon Williams, having been brought there by Ron Frank. I was left standing in the hallway just outside Eldon Williams' office about 5 minutes, whereupon Eldon Williams came back into the office. Thereafter, Ron Frank and Eldon Williams had a discussion about whether or not Eldon Williams had talked to me 'like a dog'. Then I was instructed by Ron Frank to come into Williams' office. I repeated my request for a shop steward and Ron Frank repeated his denial of my request. After I resisted further attempts by Williams to discuss my Workers' Compensation claim, Eldon Williams stated, 'that there's no reasoning with her—take her out of here and suspend her.' Immediately thereafter, under the orders of Eldon Williams, Ron Frank took me to my time clock, instructed me to clock out, and demanded that I give my employee badge to him. This treatment of me and suspension from work was a clear discrimination against me because I exercised my rights under the Missouri Workers' Compensation law." (L.F. 12-13)[2]

(Footnote 1 continued)

Cook's affidavit, L.F. 11)." It should be noted that the only evidence presented by Hussmann was the CBA, (L.F. 37-69), and the Affidavit of Bruce Halpern (L.F. 35-36), its general counsel, who had no personal knowledge of these conversations. Halpern based his affidavit on review of Cook's employment records, which were never put into evidence. Cook filed her affidavit and her attorney's affidavit specifically detailing conversations with Eldon Williams. This is the only evidence of what was actually said during these conversations.

[2] Petitioner states at page 4 of its Statement of the Case, "At the conclusion of a second meeting later that day in Williams' office, when she again refused to answer any questions, Cook was suspended pursuant to Article 8 §4 (L.F. 12-13; see preceding footnote)."

Thereafter, Cook says the following occurred:

> "Sometime the night before or during that early morning of August 27, 1990, Eldon Williams called my home and left a message on my answering machine requesting I call him at 291-2000, station 2467. I relayed this message to my attorney, Ray A. Gerritzen" (L.F. 13).

Thereafter, Ray A. Gerritzen, Cook's attorney, says the following occurred:

> "On Monday morning, August 27, 1990, Rosetta Cook called me and advised me that Eldon Williams had left a message on her answering machine requesting that she call him at 291-2000, station 2467. At approximately 10:29 a.m. on August 27, 1990, I called Eldon Williams at the above number and re-informed him I represent Rosetta Cook and asked him what he wanted with her. His reply to me was, 'We want to talk to her about her original application and these injuries she says she has in this claim for compensation.' He said to me, 'This does not involve her attorney.' I advised him that in my opinion it does and I asked him to have his attorney call me. He asked for my phone number and asked my name. I specifically asked him if he did not have a copy of our Workers' Compensation claim in front of him. His reply was, 'We probably do have that somewhere around here, but this does not involve that claim.' I then asked him well, if it does not involve the claim, how come you want to question her about the injuries she claims she has in her claim. He did not answer that question. I repeated my request to have his attorney call me. I repeated my phone number and spelled out my name for him" (L.F. 19-20).[3]

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[3] Petitioner states at page 4 of its Statement of the Case, "A few days later, Williams explained to Cook's lawyer over the phone that 'we want to talk to her about her original application' (per counsel's affidavit, L.F. 19)."

Thereafter, Cook says the following occurred:

> On August 28, 1990, at approximately 10:30 a.m. at the request of the Defendant, I went to Defendant's plant and specifically a conference room at Defendant's office, where there was present Eldon Williams and Roger O'Neal. Also present was Brenda Singleton, vice president of the union at Hussmann Corporation. Roger O'Neal asked me questions regarding my original application for employment, whereupon I told Defendant I was not discussing the original application. Roger O'Neal then showed me my Missouri Workers' Compensation claim form for my current Workers' Compensation claim and began questioning me regarding the contents of the claim and the injuries I claimed I had. He requested detailed information regarding my injuries I claimed under the Missouri Workers' Compensation law, including the Second Injury Fund injuries stated on my claim. During those requests, Brenda Singleton specifically asked Williams and O'Neal 'If Rosetta had not filed her Workers' Compensation claim, would you have her in this office asking her these questions?' Roger O'Neal's specific answer was 'No, we would not.' When I refused to answer the questions from Eldon Williams and Roger O'Neal regarding my claimed injuries in my Workers' Compensation claim against Defendant, I left the office. It is clear this conduct by Defendant was a clear discrimination against me because I exercised my rights under the Missouri Workers' Compensation law." (L.F. 14-15)[4]

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[4] Petitioner states at page 4 of its Statement of the Case, "The next day Williams and another company official met with Cook and her union representative (L.F. 14). Cook admits she was asked questions 'regarding my original application for employment' (Cook's affidavit, L.F. 14). She further admits that 'I told [Hussmann] I was not discussing the original application' (id). As before, Cook refused to answer any questions and walked out of the room (Cook's affidavit, L.F. 12 & 14)."

Thereafter, Cook filed suit in St. Louis County stating she was discriminated against and discharged by Hussmann in violation of §287.780 (L.F. 70-73). She states this was a direct result of her exercise of her rights and remedies under the Missouri Workers' Compensation law (L.F. 72).[5] Hussmann filed a Motion for Summary Judgment attaching the affidavit of its in-house attorney and vice-president, Bruce Halpern, who based his affidavit upon review of Cook's employment records (L.F. 35-36) and moved for the suit to be dismissed based upon preemption of §301 of the Labor Management Relations Act, 29 U.S.C. §185(a) and Cook's failure to invoke or exhaust the grievance procedure under the CBA (L.F. 30-33).[6]

The Circuit Court of St. Louis County entered Summary Judgment for Hussmann on the express finding that it was undisputed that Plaintiff did not file a grievance in accordance with the CBA (L.F. 6). The Missouri Court of Appeals, Eastern District, reversed, finding that the grievance procedure under the CBA was permissive, not mandatory (Petitioner's Appendix A-

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[5] Petitioner states at page 5 of its Statement of the Case, "The petition alleged she was discharged 'particularly because she would not submit to private demeaning interrogation by Eldon Williams and others' (L.F. 72)." The Petition, in fact, states, *"Plaintiff further states that as a direct result of being discriminated against and ultimately discharged by the Defendant because of her filing a claim and pursuing her rights under the Missouri Workers' Compensation law,* and particularly because she would not submit to private demeaning interrogation by Eldon Williams and others *regarding her accident at work and injuries for which she filed a claim under the Workers' Compensation law."* (emphasis ours).

[6] Petitioner states at page 5 of its Statement of the Case, "Cook submitted an opposing affidavit stating inter alia that 'I was terminated solely and only because I refused to be interrogated by Hussmann personnel' (L.F. 10)." The Affidavit, in fact, states, "I was terminated solely and only because I refused to be interrogated by Hussmann personnel, *after I had filed a Missouri Workers' Compensation claim and Hussmann had written notice of the fact of my claim and representation of me by Ray A. Gerritzen, Attorney at Law."* (L.F. 10) (emphasis ours).

13), and following *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), the four elements necessary to state a cause of action under §287.780 RSMo. do not compel the construction or interpretation of the CBA. (Petitioner's Appendix A-15). The Court noted the four elements: "(1) plaintiff's status as an employee of defendant prior to the injury; (2) plaintiff's exercise of a right granted by Chapter 287; (3) employer's discharge of or discrimination against plaintiff, and (4) an exclusive causal connection between plaintiff's actions and defendant's actions" (Petitioner's Appendix A-9). The Supreme Court of Missouri granted transfer "to resolve a conflict with earlier decisions that required exhaustion of the grievance mechanism prior to filing suit under the statute." (Petitioner's Appendix A-3). The Missouri Supreme Court, reversed the trial court following the decision in *Lingle, supra*, by holding that the 4 elements needed to be proven under a §287.780 cause of action did not require the interpretation of the CBA, and therefore, there was no preemption and Plaintiff was not required to exhaust the grievance procedures set forth in the CBA prior to bringing her civil cause of action under §287.780 (Petitioner's Appendix A-4-6). After noting that the parties did not present evidence of a waiver of the §287.780 rights in this case (Petitioner's Appendix A-6, n.2), the Missouri Supreme Court held that the rights protected by §287.780 cannot be bargained away by the inclusion of a grievance mechanism in a CBA (Petitioner's Appendix A-6). The Opinion did not address whether there would be a waiver based upon a provision in a CBA clearly waiving §287.780 or "clear and unmistakable" evidence of a waiver in a CBA, which issue was left open by this Court in *Lingle, supra*, at 409, n. 9.

On August 26, 1993, more than four months after the Missouri Supreme Court's Opinion, Hussmann filed an Answer in the Circuit Court of St. Louis County and raised as an affirmative defense certain provisions contained in the CBA as its motive for suspending and terminating Plaintiff.

REASONS FOR DENYING THIS WRIT

The Missouri Supreme Court Below Followed The Well-Settled Precedent Of This Court Concerning Preemption Under §301 Of The Labor-Management Relations Act, And Did Not Decide Any New Or Unique Federal Question Concerning Preemption; Any Alleged Conflict Between The Federal Circuit Courts Regarding Preemption Post-*Lingle* Involves Issues And Facts Not Present In This Case; And This Case Involves Factual Issues Unlikely To Arise In The Future Due To The Subsequent Enactment Of The Americans With Disabilities Act.

The limited exception to Federal preemption recognized in *Lingle*, followed and clarified the earlier precedent of this Court and does not need re-examination. In *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985), this Court found preemption of a Wisconsin tort remedy for alleged bad faith in handling a disability insurance claim that was specifically provided for in the collective bargaining agreement. The determinative factual issue was described as whether the case involved non-negotiable state rights independent of the CBA or whether "evaluation of the tort claim (was) inextricably intertwined with consideration of the terms of the labor contract." Id. at 213.[7] In *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), this Court specifically found there was no preemption of an Illinois Workers' Compensation retaliatory discharge suit, as none of the elements of the cause of action required a court to interpret any terms of the CBA. The elements of a Missouri and Illinois Workers' Compensation retaliatory discharge suit are the same,

[7] The Court specifically noted in *Lueck*, U.S. at 213, "Clearly, §301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of §301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract."

and therefore, there is no preemption in the underlying case.[8] This Petition should be denied as the sound decision in *Lingle*, does not need to be re-examined, and it clearly is controlling in the case at bar.[9]

The lower courts have uniformly applied the *Lingle* precedent holding that Workers' Compensation retaliatory discharge claims are not preempted by §301, when the elements of the cause of action do not require the interpretation of a CBA. Petitioner is

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[8] Under Illinois law, there are 3 elements of the cause of action: (1) Plaintiff's status as an employee of Defendant before injury; (2) Plaintiff's exercise of a right granted by the Act; (3) Employee's discharge causally related to the filing of a claim under the Act. *Beckman v. Freeman United Coal Min. Co.*, 122 Ill.Dec. 805, 807, 527 N.E.2d 303, 305 (Ill.1988). This Court in *Lingle*, U.S. at 407, noted only two elements, leaving off employee status. In Missouri, there are 4 elements: (1) Plaintiff's status as an employee of Defendant prior to the incident upon which the claim is based; (2) Plaintiff's exercise of a right granted by the Act; (3) Employer's discharge of or discrimination against Plaintiff; (4) an exclusive causal relationship between Plaintiff's exercising rights under the Workers' Compensation laws and Defendant terminating Plaintiff. *Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273, 275 (Mo.banc 1984). The elements of the Missouri and Illinois cause of action are the same, because the third and fourth elements under Missouri law are the same as the third element under Illinois law. In Illinois, the cause of action is not based on specific statutory provisions, noted by this Court in *Lingle*, U.S at 406-407, n. 6, but in Missouri, there is specific statutory authority. §287.780 RSMo. (1973).

[9] Petitioner attempts to differentiate this case from *Lingle* based on the assumption that this Court's decision in *Lingle* was limited to employees who had already availed themselves of the arbitration process. To the contrary, this Court reversed and vacated the 7th Circuit's decision in *Lingle*, as to a consolidated claim which involved an employee who had not availed himself of the arbitration process. *Martin v. Carling National Breweries, Inc.*, 486 U.S. 1049 (1988); *Lingle v. Norge Div. of Magic Chef, Inc.*, 823 F.2d 1031, 1034 (1987). Furthermore, in *Lingle*, U.S. at 410, n. 10, this Court cited *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394-395, for the proposition that plaintiffs could have sought redress under the CBA, but as masters of their complaint, were not required to do so.

really asking this Court to accept this case to issue an opinion on conflicts, it claims exist, between various courts on causes of action, other than Workers' Compensation retaliatory discharge. The one alleged conflicting Workers' Compensation retaliatory discharge case it cites is *Nash v. AT&T Nassau Metals, Inc.*, 381 S.E.2d 206 (S.C.1989), but *Nash*, in fact, was a claim for intentional infliction of emotional distress and outrageous conduct arising out of the employer's termination of the employee, after the employee refused to attend a medical appointment. The elements of the cause of action in *Nash*, and in fact, the entire cause of action, is different from the underlying case and the case present in *Lingle*. In fact, the *Nash* decision is in following with the case-by-case analysis of *Lingle* and *Lueck*. Petitioner, in essence, is asking this Court, in violation of *Article III of the United States Constitution*, to issue an advisory opinion on the issue of whether there is preemption in various state causes of action other than Workers' Compensation retaliatory discharge cases, such as slander, assault and battery, infliction of emotional distress, outrageous conduct, handicap discrimination, and racial discrimination. This Court should not issue opinions on hypothetical state law beyond that of the present case. *Electrical Worker v. Hechler*, 481 U.S. 862, 864 n. 5 (1987). Examination of the cases cited by Petitioner show that there is no confusion amongst the federal circuits or state courts as to Workers' Compensation retaliatory discharge suits, which do not involve the interpretation of a CBA, such as the underlying case and *Lingle*[10].

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[10] *Smolarek v. Chrysler Corporation*, 879 F.2d 1326 (6th Cir. 1989) (no preemption under Michigan Workers' Compensation retaliation suit and suit for discrimination under Michigan Handicappers' Civil Rights Act; dissent argues for preemption of handicap claim, but says no preemption of workers' compensation retaliation); *Wolfe v. Central Mine Equipment Co.*, 850 F.2d 469, 470 (8th Cir. 1988) (no preemption of Missouri Workers' Compensation Retaliatory discharge suit, reversing *Johnson v. Hussmann Corp.*, 805 F.2d

(Footnote 10 continued on next page)

Petitioner also claims there is a conflict between the circuits as to whether an affirmative defense, based on a CBA, triggers federal preemption. This once again is premised upon Petitioner's request that this Court issue an advisory opinion on cases unlike the present one, being based exclusively on Workers' Compensation discrimination. There, in fact, is no conflict amongst the circuits regarding the preemptive effect of affirmative defenses in Workers' Compensation cases.[11]

The issue in the underlying case is whether the suspension and termination of Plaintiff's employment with Hussmann arose from Hussmann's attempted interrogation of Plaintiff about her Workers' Compensation claim, in the absence of her attorney, or whether the suspension and termination arose from an attempted interrogation about Plaintiff's employment application. This is purely a factual issue of Hussmann's motive, and it doesn't

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(Footnote 10 continued)

797 (8th Cir.1986) which had held, *pre-Lingle*, for preemption of Missouri Workers' Compensation retaliatory discharge suit); *Bettis v. Oscar Mayer Foods Corp.*, 878 F.2d 192 (7th Cir.1989) (no preemption of Illinois Workers' Compensation retaliatory discharge claim). It should be noted that these cases involve state causes of action for workers' compensation retaliatory discharge suits with the same elements as *Lingle* and the present case. There are other decisions with causes of action that have completely different elements, as apparently, the particular State law does not recognize a specific cause of action for Workers' Compensation retaliatory discharge. These suits are usually claims for intentional infliction of emotional distress, claims for outrageous conduct, and/or claims for breach of implied covenant of good faith. Since these types of claims are contrary to Missouri law, they are irrelevant to this case and this inquiry.

[11] It is important to note that Hussmann never filed an Answer until August 26, 1993, well after the April 20, 1993 Missouri Supreme Court en banc opinion. As a consequence, the specific issue of preemption based upon Hussmann's affirmative defenses in its Answer was never before the Missouri Supreme Court, and Hussmann is once again requesting an advisory opinion from this Court.

involve the interpretation of the CBA. *Lingle, supra.* As such, there is no preemption. Petitioner claims the affidavits of Rosetta Cook and her attorney state otherwise, but the affidavits themselves show its claim to be misleading. (See Respondent's Statement of the Case.)

Petitioner next incorrectly states that the underlying case presents a ripe issue left open in *Lingle*. The Missouri Supreme Court Opinion states that "the rights protected by §287.780 (Missouri Workers' Compensation retaliatory discharge statute) cannot be bargained away", (Petition A-6) and Petitioner seeks to have this Court review that decision. The facts of the case show this portion of the Missouri Supreme Court opinion is dictum. Footnote 2 of the Missouri Supreme Court Opinion states:

> The Supreme Court in *Lingle* left open the question of whether a union may waive its members' individual, non-preempted state law rights. The Court noted that it would require "clear and unmistakable" evidence of waiver before deciding whether federal law preempts a state bar (such as Missouri's §287.780) to the waiver of these rights. 486 U.S. at 409 n. 9. *The parties did not present such evidence of waiver in this case.* (A-6) (emphasis ours)

Petitioner now seeks this Court to take this case to issue an advisory opinion on waiver of §287.780 by Plaintiff, when they never raised it at all in the trial court, the Missouri Court of Appeals, Eastern District, or the Missouri Supreme Court, not to mention the failure of raising "clear and unmistakable" evidence of a waiver. *Lingle*, 486 U.S. at 409 n. 9. This Court is constitutionally precluded from issuing advisory Opinions on the waiver issue, *Article III, United States Constitution*, as it is clear from the facts of this case that there is no evidenced case or controversy on waiver. *Uhler v. American Federation of Labor-Congress of Indus. Organizations*, 105 S.Ct.5, 468 U.S. 1310, 82 L.Ed.2d 896 (U.S.Col.1984). Second, this Court lacks jurisdic-

tion and its opinion on waiver would be advisory as the Missouri Supreme Court's decision that the §287.780 cause of action does not require the interpretation of the CBA is sufficient to justify their decision, and any resolution of the waiver issue would not affect the decision. *Coleman v. Thompson*, __ U.S. __, 111 S.Ct. 2546, 2553-2554 (1991). Besides this, Petitioner's Petition (pp.21-22) fails to cite any portion of the CBA which demonstrates "clear and unmistakable" evidence of a waiver, *Lingle*, 486 U.S. at 409 n. 9, as there isn't one. Therefore, the facts, as described by this Court in *Lingle*, to find a waiver are totally absent, even if same had been raised by Petitioner at any stage of this case before this Petition.

Also, contrary to Petitioner's position, federal law is clear, after this Court's decision in *Lingle*, that certain state labor standards, including Workers' Compensation, are not preempted. As stated by this Court in *Lingle, supra*, U.S. at 412:

> "In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987), we emphasized that 'preemption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State.'"

Clearly, the recognition, that a worker, union member or not, cannot be discriminated against for asserting State Workers' Compensation rights, is such a labor standard. This is supported by Congress. As stated in *Jones v. Roadway Exp., Inc.*, 936 F.2d 789, 792 (5th Cir. 1991):

> "We instructed the district court to vacate its judgment and remand the case to state court because only a state law claim remained and because Congress had declared its intent that Workers' Compensation suits should be resolved in state court whenever possible. S. Rep. No. 1830, 85th Cong., 2nd Sess., reprinted in 1958 U.S. Code Cong. & Admin. News 3099, 3103-06 * * * In deciding to remand the case, we

> relied heavily on the fact that Congress had enacted a statute, 28 USC §1445(c), barring the removal from state court of an action arising under the Workers' Compensation laws of that state. Congress clearly intended that state courts should resolve workers' compensation suits."

This Court in *Lingle* clarified federal preemption with Workers' Compensation cases, and there is no reason to re-examine this sound precedent.

Even if it was determined that *Lingle* should be revisited, this case would not be an appropriate vehicle. This case involves an employee allegedly not disclosing a previous Workers' Compensation claim in an employment application. This inquiry is currently forbidden under the Americans With Disabilities Act. 42 USC §12112(d)(4)(A); 29 C.F.R. §1630.13(b). As a consequence, any decision by this Court would set a precedent only for cases that arose prior to the Americans With Disabilities Act. This waste of the Court's resources weighs heavily against revisiting *Lingle*, if there was such an inclination.

CONCLUSION

Respondent Rosetta Cook respectfully submits that the Petition for a Writ of Certiorari to the Supreme Court of Missouri be denied.

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